

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-6078

To be argued by
MICHAEL LESCH

United States Court of Appeals

For the Second Circuit

Docket Nos. 77/6078
77/6081
77/6083

F. RAY MARSHALL, Secretary of
Labor of the United States,

Plaintiff-Appellee,

against

GEORGE SYNDER, IRVING ROSENZWEIG, GENERAL
TEAMSTERS INDUSTRIAL EMPLOYEES LOCAL 806, 806
RECORD PROCESSORS, INC., ANTHONY CALAGNA,
CLARENCE CLARKE, JOSEPH GRIPPO, JAMES ISOLA,
BENJAMIN PETCOVE AND WILLIAM SNYDER,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF OF DEFENDANTS-APPELLANTS
CALAGNA, CLARKE, GRIPPO, ISOLA,
PETCOVE AND WILLIAM SNYDER**

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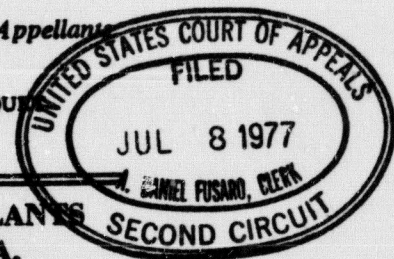


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-against-

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PROCESSORS, INC., ANTHONY CALAGNA,
CLARENCE CLARKE, JOSEPH GRIPPO,
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Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS
CALAGNA, CLARKE, GRIPPO, ISOLA,
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Preliminary Statement

This brief is respectfully submitted on behalf of
defendants-appellants Anthony Calagna, Clarence Clarke,

Joseph Grippo, James Isola, Benjamin Petcove and William Snyder (hereinafter referred to as "Appellants") in reply to the brief of plaintiff-appellee, the Secretary of Labor (hereinafter referred to as "Appellee").

Appellee's brief, like the Memorandum and Order of the District Court which it attempts to support, is premised upon a misreading of the requirements and prohibitions of the Consent Order and relies upon a presentation of "facts" which is totally unsupported by the evidence.

Appellee proceeds at the outset of its brief, under the heading "Statement of Facts," to contort the testimony elicited during the April 21, 1977 hearing in attempts to support Appellee's baseless conclusions. Indeed the "facts" recited in Appellee's brief are nothing more than Appellee's own conclusions or opinions followed by "string-cites" to record references which fail to support the alleged "facts" and in some cases even have no bearing on said facts, as is readily demonstrated by reading of the testimony itself. (See Appellee's brief at pp. 12-14).

Significantly, at page 14 of its brief Appellee concedes that the field representatives "performed some services for the plan, including assisting with delinquent contributions, acting as liaison, and answering questions by

participants about benefits. . . ." In making this concession, Appellee is apparently retreating from its previous position, as reflected on page 9 of Appellee's brief, that the field representatives were being paid "either for no work or for work for the union but not for work for the plans or RPI." (Emphasis added). Thus, even Appellee now recognizes the untenability of its prior position in light of the evidence received during the April 21, 1977 hearing.*

In addition, in its brief Appellee does not contest the fact that the services performed by the field representatives did not in any way change after the date of the Consent Order.

* The continuing assertion by Appellee that the services performed for the plans "were quite limited" (Appellee's brief at p. 14), does not withstand scrutiny. The testimony cited by Appellee, at most, indicates only that the field representatives were not responsible for the actual paper work of claims processing (A127-A129) and that during the relevant period, field representatives only delivered one or two marriage certificates and no birth certificates from the members to Ms. Craig (A113-A114, A116). This, of course, does not detract from the multitude of other services performed by the field representatives as established by the uncontroverted evidence. In addition none of the testimony cited by Appellee on the issue of collection of employer delinquencies supports Appellee's contention that the services rendered in this regard were quite limited (A162, A189, A229-A230, A235).

Reply To Point I Of Appellee's Brief

As set forth in our Main Brief, Appellee's reasoning (as well as that of the District Court), in urging a violation of the Consent Order, is premised upon a palpable misreading of the terms of the Consent Order.

Urging that the Consent Order prohibits "subsidy of the Union by RPI," Appellee at page 15 of its brief, takes issue with the "construction of the consent order advanced by appellants." However the facts are that

(a) nothing whatsoever in the Consent Order states that the four named individuals may perform services only for the Funds;

(b) nothing in the Consent Order prohibits those individuals from performing services for the Union; and

(c) the mere fact that Appellants rendered services for the Union does not prove a "subsidy."

Thus, it is Appellee, not Appellants, who, engaging in an exercise of linguistic gymnastics, are attempting to read into the Consent Order restrictions and prohibitions not contained therein. Appellants, unlike Appellee, rely

solely on the express language of the Consent Order. The Consent Order expressly provides:

"that 806 Record Processors, Inc. may continue to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder in amounts not exceeding the following. . . ." (All)

The terms of the Consent Order (which specifically avoid stating to whom services must be rendered) provided a method for continuation of services to the Funds until conclusion of the main action, without a preliminary determination of whether RPI was paying for service to the Union.

Essentially Appellee's argument boils down to its contention that "[t]he only logical reading of the provision permitting salary payments from RPI for services actually rendered would require that such services be rendered to or for the benefit of RPI; and since it is undisputed that RPI's only source of income and only clients are the plans, services to RPI are necessarily services to the plans." (Appellee's Brief, p. 16). The argument is baseless for several reasons.

First, as stated above, the order expressly avoided the question whether RPI was paying for services to the Union and merely provided that payments were to be made "for services actually rendered" without specifying to whom they were to be rendered.

Second, even read in the light most favorable to Appellee, the Consent Order can only be described as vague. In light of this vagueness it was improper for the District Court to find that defendants had violated the Consent Order.*

Third, and in any event, as is demonstrated in great detail in our Main Brief (pp. 17-41) the evidence overwhelmingly shows that the field representatives and other employees of 806 R.P.I. did perform substantial services for the Funds.

Appellee attempts to mitigate the impact of the uncontroverted testimony, showing the substantial work performed for the benefit of the Funds, by stating that Appellants "rely largely on the conclusory and self-serving testimony of the defendants." (Appellee's Brief, p. 15; See also Appellee's Brief, p. 17). As to the claim that such testimony is "self-serving", it should be noted that even Appellee in its memorandum of law in support of the motion for a receiver urged that the defendant field representatives

"are surely in the best position through their testimony to shed light on whether and to what extent they are 'actually

* Indeed, the District Court itself acknowledged the susceptibility of the Consent Order to divergent interpretations (A317).

rendering services' to RPI....." (Memorandum of the Secretary of Labor in Support of the Appointment of a Receiver, p. 10).

In addition, Appellants do not rely solely on the testimony of the four defendant field representatives. Our Main Brief is replete with references to and quotations from the testimony of non-defendants Stanley Geller (Main Brief, pp. 31, 32, 40), Annie Craig (Main Brief, pp. 23, 25-26), Constance Mavrosen (Main Brief, pp. 18, 26, 28, 29, 32-33, 39) and John Gonzalez (Main Brief, pp. 27, 35-36, 38) all of which point to the absence of a violation of the Consent Order and support the testimony of the four defendant field representatives.

Appellee's contention that Appellants rely largely on "conclusory" testimony (Appellee's Brief, p. 15) and that the evidence provides "few details" with respect to the services performed by the field representatives (Appellee's Brief, p. 18, is ludicrous. The bulk of our Main Brief is addressed to precisely this point and describes in great detail the nature of the services performed by the field representatives (Main Brief, pp. 17-41). Furthermore, Appellees had ample opportunity to cross-examine the field representatives concerning the nature of the services they performed. Yet, their testimony demonstrating their substantial work for the Funds remained unimpeached and unrebutted.

Appellee's attempts to establish inconsistencies in the testimony of the field representatives are equally unavailing. Each of the alleged inconsistencies conjured up by Appellee is unfounded. For example, the testimony of James Isola referred to on page 17 of the Appellee's brief indicates only that prior to the incorporation of 806 R.P.I. he was paid by the Union, but does not suggest that the work which he performed was other than for the benefit of the Funds. The fact is that both prior to the establishment of 806 R.P.I. and presently the overwhelming majority of work performed by the field representatives benefited the Funds.

Appellee does not contest the fact that the field representatives provided assistance in filling out claim forms. Appellee contends, however, that "only" 200 to 300 health forms were processed each month. We submit that, considering the size of the 806 R.P.I. staff, this amount was indeed very substantial.

Appellee also argues at page 18 of its brief that the forms are not complicated. The ability of Appellee's attorneys to understand the forms is, of course irrelevant, where the evidence demonstrates that the members had difficulty filling out forms correctly, understanding the nature of their benefits and required the assistance of the

field representatives in this regard (A109, A194, A226, A254). In focusing only on the claim forms which were filled out improperly and were sent back to the members by Ms. Craig (Appellee's brief, p. 18), Appellee overlooks the obvious fact that the field representatives assisted members not only in correcting their improperly filled out forms but also by helping members to properly fill out forms in the first instance. Thus, many of the properly completed forms submitted by members and received by Ms. Craig were undoubtedly products of field representative assistance.

On page 18 of its brief, Appellee attempts to establish inconsistencies in Mr. Isola's testimony on the issue of his dealings with Spanish speaking members. To be sure, the field representatives relied heavily on the assistance of John Gonzalez in dealing with the Spanish speaking members. However, Mr. Isola also testified on cross examination by the attorney for the Department of Labor that after 20 years of dealing with Spanish speaking members of the Union he has some understanding of Spanish and therefore only called upon Mr. Gonzalez "on occasion" (A230).

As noted above, Appellee does not dispute that the field representatives acted as liaisons between the membership and the clerical staff. Appellee does argue that the "task

could not consume much of their energies" (Appellee's brief, p. 19). However, this argument is based solely on Appellee's own unsupported assumption. The testimony cited by Appellee fails to support this assumption. Nowhere does Appellee mitigate, in any respect, the evidence on the issue of the liaison function set forth at pages 24-27 of our Main Brief.

Attempting to minimize the work of the field representatives, Appellee does not dispute the fact that the field representatives performed the numerous functions enumerated in our Main Brief, but rather focuses on certain of the functions individually and argues that each such function alone could not consume a considerable amount of time (Appellee's brief, pp. 17-19). Even assuming arguendo that this were true, a fair evaluation of the work performed should certainly focus on the time and effort spent by the field representatives on all of the functions which they regularly perform for the benefit of the Funds.

Appellee urges that Union officials are not paid salaries by the Union (Appellee's brief, p. 19). That fact has, of course, no bearing on the question of whether the Consent Order was violated. On the issue of office space allocation, Appellee is unable to come forward with any evidence of bad faith in the preparation of the allocation by

Mr. Galler.*

Despite all of Appellee's accusations of violations of the Consent Order and of ERISA, the undisputed fact remains that the duties performed by the field representatives and by other employees of 806 R.P.I. remained unchanged since the date of the Consent Order. The arrangement now condemned by Appellee is the very same arrangement to which it agreed in the Consent Order.

Reply To Point II Of Appellee's Brief

As is demonstrated at pages 42-44 of our Main Brief, the salary payments by 806 R.P.I. to field representatives and other employees of 806 R.P.I. did not constitute prohibited transactions,** but rather were clearly permissible under the statutory exemption set forth in ERISA §408(b)(2), 29 U.S.C. 1108(b)(2), which provides in pertinent part as follows:

* The fact that the field representatives (as their name suggests) perform services in large part "in the field," does not in itself indicate that they do not also perform "appreciable in-house duties," nor does it in any way impair the integrity of the office space allocation schedule.

** In light of this argument previously set forth in our Main Brief it is astonishing that Appellee blindly contends at page 23 of their brief that "[d]efendants, in effect, concede that the arrangements under which the six 'field representatives' and Devuone were employed by RPI were.... prohibited transactions..." (emphasis added).

The prohibitions provided in section 406 shall not apply to any of the following transactions:

* * *

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

Appellee urges that the above exemption is inapplicable to the instant case because the services rendered were not "necessary" and the compensation therefor not "reasonable," stating (Appellee's brief, pp. 23-24):

"As the Court found, and as the entire record establishes, the plans by these transactions through RPI were paying substantial salaries to provide free work for the union, which work by definition was not necessary to the operation of the plans. Since as a result the plans were not getting much service in return for the money spent, the compensation was ipso facto not reasonable."

The argument is factually unsupported and logically spurious. The evidence does not show that the field representatives were paid "to provide free work for the Union." There is not a shred of evidence in the record tending to show that their compensation by RPI was excessive, measured solely by the work performed for the Funds. And in determining the applicability of the exemption the important question is not

whether services were being rendered to the Union, as Appellee urges. Rather, the issue is whether the work which Appellee concedes was performed for the Funds was "necessary" and whether the amounts paid therefor were "reasonable." It is submitted that the uncontroverted evidence as well as the terms of the Consent Order require that these latter inquiries be answered in the affirmative.

Appellee urges that the other controlling exemption cited at page 45 of our Main Brief, i.e., ERISA §408(c)(3), 29 U.S.C. §1108(c)(3), which permits a union officer to serve as a fiduciary of a Fund, is inapplicable because defendants have allowed their role as union leaders "to dilute or subvert" their trustee duties to the participants and beneficiaries (Appellee's brief, p. 25). No evidence has been offered in support of this assertion. There has been no showing of any breach of fiduciary duty by the trustees of the Funds during the relevant period or of any detriment to the beneficiaries as a result of any activities of the trustees.

Reply To Points III and IV Of Appellee's
Brief

Defendants-appellants Calagna, Clarke, Grippo, Isola, Petcove and William Snyder adopt and incorporate by reference the portions of the brief submitted by defendants-appellants 806 R.F.I. and the Union, in reply to Points III and IV of Appellee's Brief.

CONCLUSION

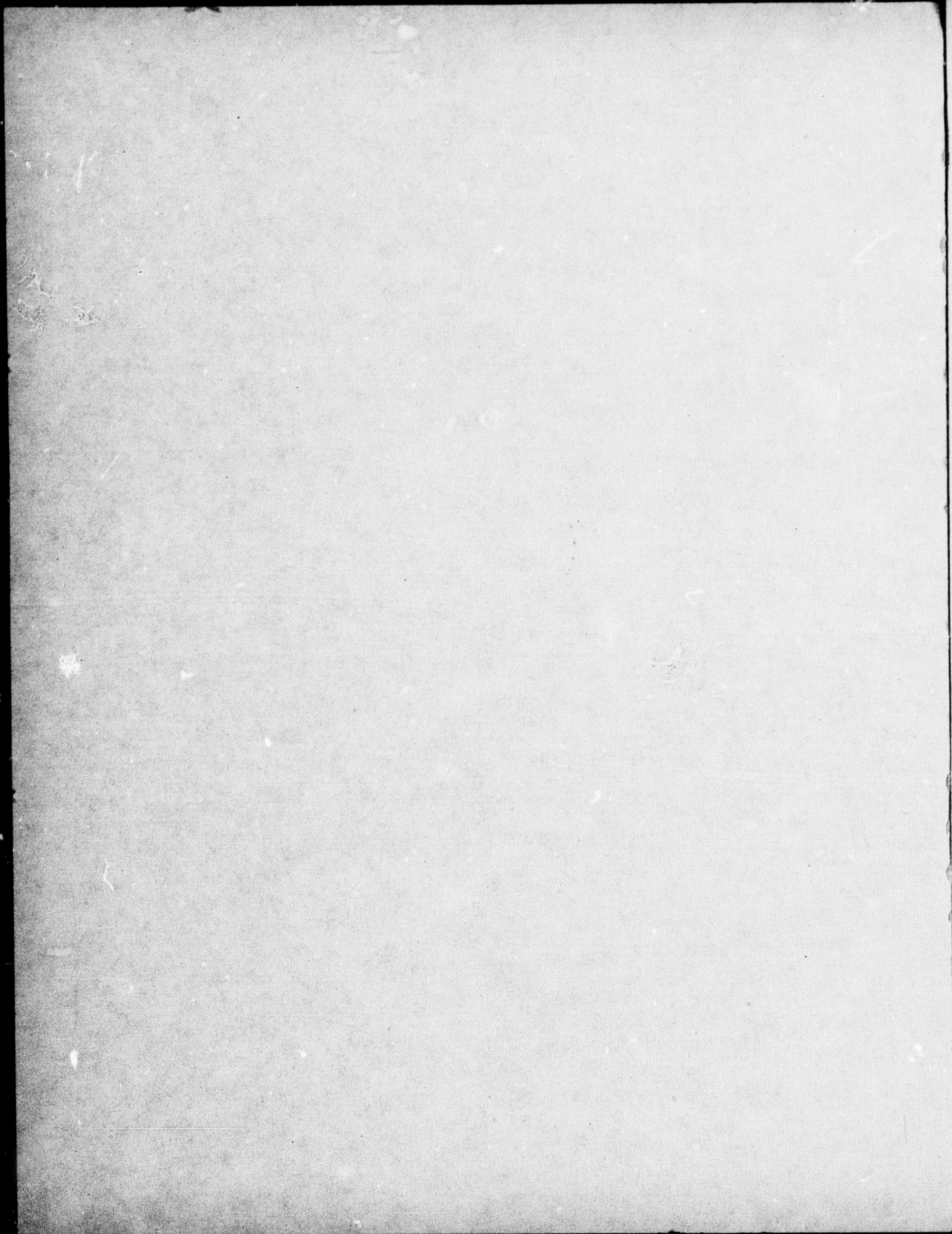
For the foregoing reasons, it is respectfully requested that the District Court's Memorandum and Order dated April 28, 1977 and the Order dated May 10, 1977 be reversed.

Respectfully submitted,

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CHARLES F. MURPHY, ESQ.

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